IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1970 c. 318, as amended;

AND IN THE MATTER OF a complaint filed by Mr. Samy Abihsira of Willowdale, Ontario alleging discrimination in employment by Arvin Automotive of Canada Limited and Mr. Sid Markham contrary to section 4(1)(b) and (g) of the Ontario Human Rights Code.

BOARD OF INQUIRY: Ian A. Hunter

APPEARANCES: Mr. Tom Lederer, counsel for the Commission

Mr. Samy Abihsira, in person

Mr. W. Phelps, counsel for Arvin Automotive and Mr. Sid Markham

Hearing on the preliminary objection was held in Toronto, Ontario on October 14, 1980.

DECISION ON PRELIMINARY OBJECTION

On June 13, 1980 I was appointed by the Honourable Robert Elgie, Minister of Labour, as a Board of Inquiry pursuant to the Ontario Human Rights Code to hear and decide a complaint made by Mr. Samy Abihsira alleging discrimination in employment by Arvin Automotive and Mr. Sid Markham contrary to section 4(1)(b) and (g) of the Ontario Human Rights Code. Notice of Hearing dated 18 August 1980 was sent to all parties and the Board of Inquiry convened in Toronto on October 14, 1980. My appointment and the signed complaint of Mr. Abihsira were filed as exhibits at the outset of the hearing.

At that stage, Mr. Phelps indicated a preliminary objection to the jurisdiction of the Board of Inquiry proceeding and this interim decision deals only with that preliminary objection.

Mr. Phelps submitted that the Board's jurisdiction to inquire into Mr. Abihsira's complaint was "blocked" for various reasons.

First, Mr. Phelps submitted that the Board's jurisdiction was precluded by operation of section 37(1) of the Labour Relations Act.

Mr. Samy Abihsira was discharged from his employment with Arvin Automotive on June 21, 1978. He filed a grievance under a collective agreement then in force between the Union (United Steelworkers of America) and the Company. On November 15, 1978 there was a hearing before a three man arbitration board which issued a unanimous written award on November 28, 1978 dismissing the grievance.

Mr. Phelps submitted that the grievance arose out of the same facts, and concerned the same incidents, as the complaint filed with the Ontario Human Rights Commission. Section 37(1) of the Labour Relations Act provides for "...the final and binding settlement by arbitration... of all differences between the parties" and subsection (a) goes on to stipulate that: "The decision of an arbitrator or an arbitration board is binding,

(a) upon the parties; and

...(d) upon the employees covered by the agreement who are affected by the decision."

Mr. Phelps argues that the complainant, Mr. Abihsira, has had his concern inquired into by an arbitration board under the collective agreement, and that the arbitration board decision is, under section 37(1), "...final and binding" on Mr. Abihsira, both by virtue of his having been a "party" to the arbitration proceedings and because he was an employee covered by the collective agreement and affected by the decision. Mr. Phelps referred extensively to the arbitration award to demonstrate that precisely the same issues which this Board of Inquiry would be required to deal with should this hearing proceed had previously been dealt with by the arbitration board and resolved adversely to Mr. Abihsira. He alluded to the public interest specified in the Preamble to the Labour Relations Act ("...it is in the public interest of the Province of Ontario to further harmonious relations between employer and employee by encouraging the practice and procedure of collective bargaining") and he contended that it would be inimical to the practice of collective bargaining and the

procedure for final and binding resolution of disputes through arbitration, if this Board of Inquiry were, in effect, to "re-hear" a matter already disposed of.

Mr. Phelps did not argue that the Labour Relations Board and the Ontario Human Rights Code were in conflict or that the latter statute should yield jurisdiction to the former statute; rather he submitted that: "...the remedial provisions of collective bargaining legislation supplant the inquiry in the remedial provisions of the Code, insofar as the Code would apply to a collective bargaining situation" (transcript: page 52). In other words, it is not the objects of the legislation but the remedial provisions that pose the conflict.

After giving this argument careful consideration, I cannot accede to it.

Section 37(1) does speak of the "...final and binding settlement by arbitration...of all differences between the parties," but goes on "...arising from the interpretation, application, administration or alleged violation of the agreement...." The issue before this Board of Inquiry is an alleged violation, not of the collective agreement, but of section 4 of the Ontario Human Rights Code. The "differences" between the parties at this hearing relate directly to the interpretation and application of section 4 of the Ontario Human Rights Code, not to any particular article of the collective agreement.

"Final and binding" in section 37(1) of the Labour Relations Act can only mean final and binding for the purposes of that Act, not for all

legal purposes. For example, if an employee is discharged in an offensive or insulting manner, he would not forfeit his right of access to the court for defamation simply because an arbitration board had dismissed his grievance. Of course, a board of inquiry is a quasi-judicial tribunal, not a court, and it might be argued that the presumption of statutory interpretation against depriving a subject of his right of access to the courts has less force; nevertheless, the Board of Inquiry is the tribunal empowered by the Ontario legislature to hear and decide alleged contraventions of the Ontario Human Rights Code and the subject cannot, in my opinion, be deprived of his right of access to that tribunal simply because of a pre-existing arbitration award concerning the same incident. An alleged breach of the Ontario Human Rignts Code is not, in short, "...a difference...between the parties relating to the interpretation, application or administration of an agreement."

The preamble to the Labour Relations Act proclaims a public policy in Ontario relating to collective bargaining between employers and trade unions; the preamble to the Ontario Human Rights Code also proclaims a public policy, this public policy in relation to equality, namely that "...every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality ancestry or place of origin" and provides a remedial procedure to enforce that public policy. The remedial procedure provided in the Labour Relations Act does not oust, supplant or alter the remedial procedure in the Ontario Human Rights Code.

It may be (and at this preliminary stage I cannot know) that precisely the same facts and the same issues will emerge at the Board of Inquiry as were before the arbitration board; if that happens, the

unfortunate possibility exists of different findings and inconsistent decisions. Mr. Phelps quite properly expressed the respondent's concern about that. But that would not affect the *jurisdiction* of an arbitration board, properly constituted, to decide the grievance, nor the *jurisdiction* of a board of inquiry, properly appointed, to decide the complaint of discrimination. Even if the facts relating to the grievance and the complaint were in all respects identical, in my opinion both tribunals would have jurisdiction since they exist for different purposes and they derive their authority under different statutes and can order different remedies.

Mr. Abihsira's grievance concerned discharge. The remedies available to an arbitration board in a discharge case are set out in section 37(8) of the Labour Relations Act: "The arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances."

Section 14(c)(b) of the Ontario Human Rights Code gives the remedial powers of a board of inquiry when it determines that a party has contravened the Act: "...[the Board] may order any party who has contravened this Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor."

A plain reading of the two statutes clearly indicates that the remedial procedures are (a) different and (b) potentially more extensive

under the Code than under the Labour Relations Act.

In practice, Boards of Inquiry under human rights legislation have made orders including awards of special and general damages, requiring respondents to offer jobs or accommodation which has been denied, or certain preventative measures, such as requiring the posting of Human Rights Code cards, notifying the Commission of future employment vacancies prior to public advertisement, etc. Clearly these remedies are more extensive than those open to an arbitration board.

I cannot accept the contention that the remedial provisions of the two Acts are the same or even substantially similar, nor that because the same facts may support both a grievance under the collective agreement and a complaint under the Ontario Human Rights Code, the remedial procedures of the Code have somehow been supplanted by the remedial procedures of the Labour Relations Act.

It is undoubtedly true that, had Mr. Abihsira succeeded before the arbitration board, Arvin Automotive would not have had "a second chance" at a board of inquiry. But if that is a defect, it is one which calls for legislative change. Had the legislature intended to bar an employee from having a second chance, it could easily have done so. But it has not. Some commentators have gone so far as to presume that the lack of such a statutory bar suggests "...that the legislature at least in part enacted the Ontario Human Rights Code because it believed the grievance-arbitration machinery was not adequate to protect employees from discrimination." (John I. Laskin: Proceedings Under the Ontario Human Rights Code, 1980 Advocates Quarterly 290)

Nor am I convinced that a properly appointed Board of Inquiry which has jurisdiction in the technical sense could decline to proceed under the Code. Section 14a of the Code deals with appointment. Section 14b(6) states: "Subject to appeal under section 14d, the Board of Inquiry has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act...." Section 14(c) provides: "The Board, *after hearing a complaint,*

(a) shall decide whether or not any party has contravened this Act."

Once a Board of Inquiry is satisfied that there are no valid jurisdictional obstacles, I see nothing in this mandatory language in section 14 which would indicate a discretion on the part of the Board to decline to hear and decide whether a party has contravened the legislation because of some concern about the employee having a second forum available to him which is unavailable to the employer.

Mr. Phelps's third ground of objection was that resolution of Mr. Abihsira's complaint will require this Board of Inquiry to examine and interpret the collective agreement that was in force between Arvin Automotive and the Union on June 21, 1978. But a Board of Inquiry has no authority, he asserted, to interpret a collective agreement--that being the sole prerogative of an arbitration board. Since interpretation of the collective agreement is "inextricably interwoven" with hearing and deciding the human rights complaint, the Board lacks jurisdiction.

This objection may be shortly disposed of. At this stage, it is impossible for the Board to know whether or not it will be necessary to examine and interpret the collective agreement in order to hear and decide the human rights complaint. If this proves to be necesssary, I am satisfied I have authority "to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act" (Section 14b(6)). If this requires examining and interpreting the collective agreement, for the purpose of hearing and deciding Mr. Abihsira's complaint, then I am satisfied I have such authority. An arbitration board under section 37(1) of the Labour Relations Act has authority to interpret the collective agreement for the purpose of resolving differences between the parties relating to or arising from the collective agreement; if it became necessary, I would be examining and interpreting the collective agreement for a quite different purpose--namely, to hear and decide whether or not Arvin Automotive have contravened section 4(1)(b) or (g) of the Ontario Human Rights Code.

This is so despite the existence in the collective agreement of a non-discrimination clause of similar wording to section 4(1) of the Code; article 3:02 of the collective agreement in the instant case stated: "The company agrees that no employee shall be discriminated against...on account of race, creed, colour or religion." While the wording is not identical, it is sufficiently similar to that of the Code that I accept Mr. Phelps's argument that it would be "nit-picking" to find any substantive difference in the language alone. But even if the wording of the clause in the collective agreement were identical to that in the Code, I am of

the opinion that a Board of Inquiry would have authority to hear and decide a complaint of discrimination under the Code, notwithstanding that an arbitration board had previously decided that there was no violation of a non-discrimination article in the collective agreement.

At the heart of Mr. Phelps's preliminary objection to the Board's jurisdiction is the concept of *res judicata*, essentially that a matter having once been properly decided should remain decided.

In my opinion, this doctrine does not apply to the circumstances of the instant case.

In George Spencer Bower's treatise The Doctrine of Res Judicata (2nd edition, Turner, 1969, Butterworths) it is written: "Any party who is desirous of setting up res judicata by way of estoppel...must establish all the constituent elements of an estoppel...that is to say, the burden is on him of establishing (except as to any of them which may be expressly or appliedly admitted) each and every of the following:

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular decision relied upon was in fact pronounced...;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;

(iv) that the judicial decision was final;

(v) the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised; and

(vi) that the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised..." (page 18-19).

Even if I were fully satisfied on the first four points, Mr. Phelps would bear the onus of satisfying me on points (v) and (vi) as well. In respect of point (v) I have already indicated that, in my opinion, the question to be determined by the Board of Inquiry (an alleged contravention of the Human Rights Code) is different from the question previously determined by the arbitration board (an alleged contravention of the collective agreement). In respect of point (vi) the parties are not the same; the Ontario Human Rights Commission was not a party to the arbitration proceeding; by section 14(b)(1)(a) of the Code the Commission is not only denominated as a party to the Board of Inquiry proceedings, but also the party "...which shall have the carriage of the complaint."

Neither counsel had been able to find any Canadian authority dealing directly with the application of the res judicata principle to human rights inquiries; in Hall v. Etobicoke Fire Department (1977) a preliminary objection to a Board of Inquiry's jurisdiction was made on the basis that the complainant should have sought his remedy through the arbitration process of the collective agreement rather than the Code. The Board chairman wrote: "...the matter is not just a private dispute between parties to a collective agreement. It raises an issue of public importance and general concern provided for by statute, and the right of individuals to complain, and of the Commission to inquire, cannot be restricted by a collective agreement" (page 2-3).

Two American cases have dealt with precisely the issue involved in the instant case. In the earlier case (Dewey v. Reynolds Metals (1961), 402 U.S. 689) the sixth circuit court of appeals had held that if the issues under Title VII of the Civil Rights Act of 1964 were identical to those that had been decided by the arbitration board, then the civil rights complaint ought not to proceed. But in Alexander v. Gardner-Denver (1974), 94 S. Ct. 1011 the U.S. Supreme Court held that an employee's statutory rights under Title VII of the Civil Rights Act are not foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective agreement. Mr. Justice Powell, writing for the Supreme Court, indicated the policy grounds underlying the Court's decision:

> "Title VII was designed to supplement, rather than supplant existing laws and institutions relating to employment discrimination. In sum, Title VII purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective agreement" (page 1020)
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> "...rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the Union as collective bargaining agent to obtain economic benefits for union members. Title VII, on the otherhand, stands on plainly different grounds; it concerns not majoritarian processes, but an individual's right to equal employment opportunities" (page 1021)
>
> "...a contractual right to submit a claim to arbitration is not displaced simply because Congress has also provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the agrieved employee..." (page 1022)
>
> ...in instituting an action under Title VII, the employee is not seeking review of the arbitartor's decision. Rather, he is asserting a statutory right independent of the arbitration process. An employer does not have "two strings to his bow"

> with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices." (page 1022-3)

The policy considerations which govern the U.S. Supreme Court's decision in the Gardner-Denver case, as illustrated by these extracts, seem to me to be soundly based and I respectfully adopt them.

Mr. Phelps next submitted that the respondent would be prejudiced by the complainant's delay in filing the complaint. The complainant was discharged on June 21, 1978. The arbitration board gave its decision on November 21, 1978. The complaint which I was appointed to hear and determine, which accompanied my appointment and was filed as an exhibit, is dated May 23, 1979. Beyond the actual dates, I am not in a position to determine, at this stage, whether this was an unreasonable delay or whether Mr. Abihsira has some satisfactory explanation for the lapse of time between the arbitration board decision and the filing of a complaint. In any event, if I were to find that there had been unreasonable delay, it is something that may best be dealt with by way of the relief provided in the event that the Board were to uphold the complaint.

Mr. Phelps next contended that there was a failure to comply with a statutory condition precedent to the authority of this Board of Inquiry; namely, the failure by the Minister of Labour to exercise his discretion pursuant to section 14a(1) in the appointment of the Board. Mr. Phelps filed as exhibits a letter he wrote on behalf of the respondent to the Minister of Labour on 7 May 1980 requesting the minister to

"...exercise your discretion by declining to appoint a Board of Inquiry"; and the Minister's reply dated 25 June 1980 indicating that he had appointed this Board of Inquiry. I cannot accept that a failure to accede to Mr. Phelps's arguments for not appointing a Board of Inquiry constitutes a failure to exercise the discretion invested in the Minister by section 14a(1). The Minister exercised his discretion by the act of appointing this Board of Inquiry.

Finally, Mr. Phelps submitted that Mr. Abihsira's complaint of 23 May 1979 does not allege discrimination because it does not indicate that he was treated in a different way from all other employees of Arvin Automotive. Mr. Abihsira's complaint concludes: "I am a landed immigrant to Canada from Switzerland originally from Morocco and Jewish by faith and I feel that I have been discriminated against in employment because of my creed contrary to the Human Rights Code, section 4(1)(b)(g)...." The complaint is made against Arvin Automotive of Canada Limited, its servants and agents, and Mr. Sid Markham. The complaint is clearly in conformity with section 13(1) of the Code and the subsequent sections detailing the steps necessary to a valid appointment of a Board of Inquiry. There is no merit in this objection.

For all of the foregoing reasons, I reject Mr. Phelps's preliminary rejection to the jurisdiction to this Board of Inquiry to hear and determine the complaint of Samy Abihsira. The Board will reconvene at a convenient date, to be arranged with the parties, to hear and decide the complaint.

IAN A. HUNTER
December 8, 1980